(3)

FILED
NOV 19 1997
CLERK

No. 97-166

In The

Supreme Court of the United States

October Term, 1997

DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEVEN McMILLAN and PAUL AHMANN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PETITIONERS' REPLY BRIEF

TIMOTHY H. ESSER
Counsel of Record
NUXOLL, LIBEY, ENSLEY, ESSER & CAMPBELL
520 East Main Street
Pullman, WA 99163
(509) 332-7692
(509) 334-2205 [fax]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

PETITIONERS' REPLY BRIEF

Respondent cites with approval Justice Kennedy's concurring opinion in *United States v. Halper*, 490 U.S. 435, 104, L.Ed.2d 487, 109 S.Ct. 1982 (1989), wherein Justice Kennedy states at page 453:

> It [today's holding] does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.

This language contrasts with the majority's holding in the present case, *State v. McClendon*, wherein the court interprets *Halper* thusly:

> Under *Halper*, the purposes actually served by the sanction at issue must be assessed in determining whether a civil sanction is "punishment" under double jeopardy analysis. *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997), (appendix page 17 Petition for Writ of Certiorari)

In *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2125, 135 L.Ed.2d 549 (1996), the court described the *Halper* analysis as a balancing test, but nevertheless adopted a bright line rule for civil forfeitures stating at page 2145:

> Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture . . .

Thus, the result in *Ursery* is consistent with the "objective rule" analysis stressed by Justice Kennedy in his concurring opinion in *Halper*.

Review of *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997) should be granted to consider whether another bright line rule should be applied, instead of the balancing approach suggested by *Halper* and followed by the Washington Supreme Court. We submit that when a civil sanction results in enhanced mandatory jail, the nature of said sanction is so clearly punitive that it should be considered punishment regardless of the fact that other aspects of the sanction or other sanctions imposed in the civil proceeding might be considered remedial.

We (Petitioners) rely on *Ball v. United States*, 470 U.S. 856, 84 L.Ed.2d 740, 53 USLW 4395 (1985), for the proposition that a conviction, even if its sentence is ordered to run concurrent with another conviction, nevertheless constitutes punishment as it may:

> Result in an increased sentence under a recidivist statute for a future offense. *Ball* at 864.

It is precisely this point that the majority of the Washington State Supreme Court in this case ignores.

The Respondent State of Washington in its opposition brief cites with approval the following quote from the concurring opinion filed by Judge Talmadge:

> I cannot comprehend how the [Double Jeopardy] Clause can apply to something that has not yet happened, and may never happen, to require dismissal of the DUI charges in this case. *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997) (Appendix page 28 Petition for Writ of Certiorari)

The Respondent then argues that the more recent U.S. Supreme Court case of *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), somehow distinguishes the holding of *Ball*. A careful reading of *Witte* suggests that it is consistent with *Ball* and when applied to the present facts would result in the administrative imposition of a probationary license being found as punishment as it acts as the equivalent of a criminal conviction for sentencing enhancement purposes. The U.S. Supreme Court in *Witte* answers Judge Talmadge's concern at page 397:

> This claim is ripe at this stage of the prosecution – although petitioner has not yet been convicted of the cocaine offenses – because, as we have said, "courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 151, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). See also *Ball v. United States*, 470 U.S. 856, 861, 864-865, 105 S.Ct. 1668, 1671, 1673-1674, 84 L.Ed.2d 740, (1985) (explaining that, for purposes of the double jeopardy inquiry, punishment "must be the equivalent of a criminal conviction and not simply the imposition of sentence); . . .

The court in *Witte*, however, holds that the consideration by the sentencing court of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range does not constitute punishment for that conduct, *Witte*, page 397. Here, should the Petitioners be prosecuted for DUI out of a new incident, and convicted, the court at that sentencing will necessarily

impose an enhanced jail sentence because of the administrative finding in this case – even if Petitioners are acquitted of the pending DUI charge. As Justice Stevens notes in his *Witte* dissent at page 413:

> In *United States v. Halper,* and *Montana v. Kurth Ranch* (citations omitted) we emphatically rejected the proposition that punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial.

That statement is accurate and seems at odds with the following dicta from the *Witte* majority decision at page 400:

> In addition, by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in "punishment" for such conduct.

Respondent might cite this latter statement for support on the merits. But for purposes of this Petition and the issue of why the U.S. Supreme Court should grant certiorari, we respectfully suggest there is a need to clarify the appropriate analysis to apply when the State seeks an administrative civil sanction which acts as the equivalent of a criminal conviction and simultaneously proceeds with an independent criminal prosecution.

The U.S. Supreme Court in *Ursery,* has adopted a bright line rule in the circumstance of civil forfeiture. In view of the evolution of double jeopardy law since *Ball,* specifically that civilly imposed sanctions may implicate

double jeopardy punishment protections, another bright line rule should be applied rather than the *Halper* majority's balancing analysis. Specifically, where the civil sanction is the equivalent of a criminal conviction for jail enhancement purposes, it should be considered punishment.

DATED: This 18th day of November, 1997.

Respectfully submitted,

NUXOLL, LIBEY, ENSLEY,
ESSER & CAMPBELL

TIMOTHY ESSER
Attorneys for Petitioners